vices, obedience, maintenance, &c., and not the right of inheritance to his property, in which case these states should be put in class third.

6. The adopted child and the children by blood, inherit from and through each other as if they were brothers and sisters by blood. Pennsylvania (Br. Purd., p. 61). When, however, the adopted child shares the inheritance only in case of intestacy.

7. The terms of the adoption are made a matter of agreement between the parties. Nebraska (Gen. Stat. 1873, p. 649–50).

8. The adopted child is made a son or daughter in fact, which being an impossibility, is, we believe, attempted nowhere: *Shafer* v. *Eneu*, 54 Penna. St. 306.

H. G. W.

Supreme Court of Vermont.

WHEELER v. WHEELER.

An advancement made by the intestate in due form may be legally cancelled by him, by any unequivocal act carrying the same into execution, as by surrendering or cancelling the evidence of such advancement.

THIS was an appeal from a decree of the Probate Court, charging the appellant with an advancement towards his share in his father's estate, which he claimed had been subsequently cancelled by his father and could not therefore be reckoned as an advancement.

The opinion of the court was delivered by

ROSS, J.—The statute in relation to advancements (Gen. Stat., chap. 56, sects. 12, 13), declares what shall be evidence of an advancement, and excludes all other evidence. This has become the settled doctrine in this state: *Newell* v. *Newell*, 13 Vt. 33; *Brown* v. *Brown*, 16 Vt. 197; *Heirs of Adams* v. *Adams*, 22 Vt. 51; *Weatherhead et al.* v. *Field*, 26 Vt. 665. Hence, with us the law presumes, that property given by an intestate to an heir is an absolute gift, unless the intention of the intestate to have it charged to such heir as an advancement is evidenced in one of the four ways named in the statute.

By the pleadings it is conceded that the intestate, February 12th 1848, delivered to the appellant, his son, $2000 by way of advancement towards the son's portion, and took from the son a receipt of that date, in which the son acknowledged he had received of the intestate that sum towards his portion. The $2000 thus became properly evidenced as an advancement to be charged to the appellant in the distribution of the estate of his father. The issue made by the pleadings, and tried by the court below, is, whether the

father subsequently delivered this receipt to the appellant and relinquished his right to have the $2000 charged to the appellant as an advancement. This issue has been found by the jury in favor of the appellant. The only questions reserved, are in regard to the competency of the evidence on which the jury have found this issue. All the appellant's evidence, on which this issue was established in his favor, was admitted against the exception of the estate. The testimony of Mary Wheeler in substance was, that on a certain occasion the intestate surrendered the receipt, and ordered it burned, and it was burned. It is not claimed that she was disqualified as a witness because she was the wife of the intestate at the time the transaction transpired to which she testified; nor, that her testimony did not tend to establish the issue made by the pleadings. But it is claimed, that a surrender and cancellation of the receipt, could not, if made as testified to, change the $2000 from an advancement to an absolute gift. In short, it is claimed that the intestate could not, by any act short of a will executed in due form, change what he had once delivered and properly evidenced as an advancement to an absolute gift. In support of this, it is argued, that when a man has once delivered property in such a manner that it has became an advancement towards, or in satisfaction of the share which the receiver, as heir, would be entitled to receive from the estate of the giver, the giver has parted with all beneficial interest in the property, which he has or can have in his lifetime; that he cannot recall the same from the heir, nor charge the heir with the use of the property; that the only right remaining in the ancestor, is that of having the property, thus delivered, reckoned towards or in satisfaction of the heir's share in the distribution of his estate; that to allow a man to surrender or cancel this right which pertains solely to the distribution of his estate after his decease, by any other way than by a duly executed will, is contrary to the policy and intent of the statute in regard to the disposition of property by will.

This view at first appears to have some plausibility. It must be conceded, that when a man delivers property in such a manner that it becomes an advancement, he parts with all beneficial interest in it, and only retains the right to have it reckoned in the distribution of his estate towards, or in satisfaction of, that portion of his estate which the heir would be entitled to. It is, also, clearly against the statute in regard to the disposition of property

by will, to allow a person to *direct* or *control* the distribution of his estate in any other way than by a legally executed will. The fallacy of this view lies in treating property thus advanced as a part of a man's estate before his death. A man's estate is what he leaves at his decease. During his life a man may dispose of his property as he pleases. If he make an absolute gift, it will very likely affect the amount which he will leave to constitute his estate. Yet he has a right, while living, to deliver property as an absolute gift. By the delivery of property as an advancement, and the surrender or cancellation of his right to have the property so delivered reckoned as an advancement, the owner accomplishes by two acts what he may accomplish by one act, in delivering the same property as an absolute gift. As the whole necessarily includes all its parts, the right to make a gift includes and carries with it, the right to deliver property as an advancement, and then to discharge the advancement. It can make no difference in law, whether the giver accomplishes the same thing by two acts or by one act. The result arrived at is the same. The two acts no more contravene the policy of the law in regard to a man's controlling the distribution of his property after his decease than the one. A man who discharges an advancement in his lifetime, affects, it may be, incidentally the distribution of the property he may leave at his decease; but no more so, and in much the same way, he affects it, when he makes an absolute gift. He does not, in such a case, *direct* or *control* the distribution of *the property which he leaves* at his decease. This he can only do by a legally executed will. He simply withdraws what he has once delivered as an advancement, from being reckoned as a part of his estate in the distribution thereof, the same as he does when he makes an absolute gift. The right to have the property delivered, reckoned as an advancement is his right, and not the right of those who may prove to be his heirs. It is a right he has retained to himself in the property delivered, as against the receiver of the property. Its surrender or cancellation may have the effect to lessen the shares of the other heirs, but no more so than an absolute gift of the same property. He may discharge this right in the same way he may any other right which pertains to him personally.

The counsel for the estate has called our attention to no decided case which supports the view he urges upon us. Only two cases have come under our notice, in which evidence has been

received tending to show that the intestate had attempted to change an advancement to a gift. In *Clarke* v. *Warren*, 3 Conn. 355, the intestate had charged to some of his children various articles towards their respective portions. To the appellant the charge was as follows: "Salisbury, January 1803, Nathaniel Clarke, my son, Dr. The following articles, that may be charged are to go towards his portion." Then followed the charges. In the opposite column the intestate had written, "Salisbury, January 1823. To the contrary by a gift, I balance my son, Nathaniel C. Clarke's account," "N. CLARKE." Similar charges and entries were made against his other children. The court say: "If the entries are to receive their greatest effect they would have the effect only of a gift by the father to these children: and in that view according to the doctrine of this court in *Hatch et al.* v. *Straight*, 3 Conn. 31, they must be deemed advancements." "Had the deceased explicitly declared that they were not to be deemed advancements, or part portion, the case might have been different. But his entries are not to this effect. They seem to me merely to pursue his intentions, expressed when he made the charges. They were not to stand against the children as *debts* but as *gifts*, and gifts, too, toward their portions." By this extract from the opinion it is apparent that all gifts which, at common law, would be advancements, in that state, were presumed to be made as advancements, if nothing more was shown, though the intention of the intestate if made known to the contrary would control. The right of the intestate to change advancements to gifts that could not be reckoned as advancements was assumed and not raised or discussed in the case. In *Gilbert* v. *Witherel*, 2 Sim. & Stu. 254, the father had advanced his son 10,000*l.*, to go into business with, and taken his note therefor. The son made payments on the note, became involved in the business, and the father took the property and assumed the debts. The son had continued in the business at the request of his father against his own wishes. The son claimed that the father was to surrender the note, if he did not get pay on it out of the property which he passed over to him. Subsequently the son had, in writing, stated and acknowledged that a certain sum was due on the note to his father. The father, a few days before his decease, when the son was not present, had the note burned. The son claimed that this act extinguished it as a debt and as an advancement. The court held, that, though the de-

struction of the note by the father discharged the debt, yet under the statute 22 & 23 Charles, relating to distribution of estates the amount acknowledged due by the son remained an advancement. The only thing considered by the court was the effect of the destruction of the note, and not the right of the father to change an advancement to a gift which could not be reckoned as an advancement. By the statutes under which these decisions were made, all gifts by the father to a child, made towards the establishment of the child in life, if nothing were shown to the contrary, were presumed to have been made as advances.

The foregoing opinion embraces a question which seems not to have occurred in the courts so often as we should have expected. The case of *Gilbert* v. *Witherel*, 2 Sim. & Stu. 254, cited in the opinion, is almost the only case we have been able to find, where any light is thrown upon the question. And that seems to have been ruled, mainly, upon its particular facts and the intention presumptively arising therefrom. But, upon principle, we cannot comprehend why there should be any doubt or difficulty in the question.

The advancement towards a distributive share in an intestate estate, or a portioning off a child with the anticipation of the provisions for such child, in the parent's will, are matters resting wholly *en pais*, and cannot be regarded as definitely settled, at the time the advancement or portion is made, but must be subject to the control of the intestate, or the testator, during his life. In the case of an advancement, strictly speaking, towards the distributive share in the intestate's estate, its creation depends upon being evidenced in a particular manner, and its continuance depends upon the preservation of such evidence, or, at all events, the voluntary destruction of the evidence, by which the advancement was created, must effectually destroy the effective continuance of the character of the advancement. As the intestate might originally have made it a gift, so it is but reasonable that he should be able to cancel the evidence by which it is made an advancement, either by removing it back, or making it entirely a gift. The intestate might clearly cancel the advancement by making a new gift of equal amount, without charging it as an advancement. And if he can thus indirectly cancel the advancement, there can be no good reason why he may not do it by cancelling the evidence.

I. F. R.

U. S. District Court, Eastern District of Virginia.

IN RE CHAMBERLAINES.

A consignment of goods under a special contract, in which the consignee gives his acceptances for their value, payable partly at sight and partly at a future day, and agrees to account for the whole price, to guarantee the sales, and to receive a commission of ten per cent. with other stipulations, making him primarily liable for the price of the goods, falls within the principle of *Ex parte White, in re Nevill*, Law Rep. 4 Ch. App. 397, and is a consignment on sale, as distinguished from a consignment on *del credere* guaranty.